

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT DAYTON

WILLIAM G. ZUERN,

Petitioner,

:

Case No. C-1-92-771

- vs -

Chief Judge Walter Herbert Rice
Magistrate Judge Michael R. Merz

ARTHUR TATE, JR., Warden,

Respondent.

:

REPORT AND RECOMMENDATIONS ON CERTIFICATE OF APPEALABILITY

This is a habeas corpus action brought by Petitioner William G. Zuern pursuant to 28 U.S.C. §2254 and seeking relief from both his conviction for aggravated murder with death specifications and his resulting death sentence. Chief Judge Rice has granted relief on one of Petitioner's claims and denied the remainder. *Zuern v. Tate*, 101 F. Supp. 2d 948 (S.D. Ohio 2000). Petitioner has appealed and now seeks a certificate of appealability¹ on the following claims:

Claim 1. Petitioner Zuern is not guilty of the crime of aggravated murder. His conviction and resulting death sentence violate the Eighth and Fourteenth Amendments.

Claim 2. Petitioner Zuern's conviction and death sentence were obtained in violation of the Due Process Clause of the Fourteenth Amendment. The evidence at trial was not sufficient to show that he acted with prior calculation and design to kill a guard.

¹Chief Judge Rice granted a certificate of probable cause, following the Sixth Circuit's decision in *Norris v. Schotten*, 146 F. 3d 314 (6th Cir.), *cert. denied*, 119 S. Ct. 348 (1998), that the AEDPA did not apply to cases filed before but appealed after its effective date. The supervening decision in *Slack v. McDaniel*, 120 S. Ct. 1595(2000), requires instead that Petitioner obtain a certificate of appealability.

Claim 3. Petitioner's capital conviction and resulting death sentence were obtained in violation of the Due Process Clause of the Fourteenth Amendment. The prosecution suppressed evidence that was material to Petitioner's guilt or punishment.

Claim 4. Petitioner Zuern's capital conviction and resulting death sentence were obtained in violation of the Due Process Clause of the Fourteenth Amendment. An important State's witness gave false testimony against Petitioner Zuern.

Claim 5. Petitioner Zuern was denied a fair trial, guaranteed by the Eighth Amendment and the Due Process Clause of the Fourteenth Amendment, when the prosecution repeatedly used both evidence and argument about the victim's good character to attain a capital conviction and resulting death sentence.

Claim 6. The trial court's refusal to grant a mistrial after a State's witness testified that Petitioner Zuern had killed before denied Petitioner his right to a fair trial guaranteed by the Due Process Clause of the Fourteenth Amendment.

Claim 7. Petitioner Zuern was denied his Sixth and Fourteenth Amendment rights to a fair trial by an impartial jury when the trial judge failed to excuse a juror who, in the midst of trial, overheard a television news story describing Petitioner's prior murder charge.

Claim 8. Petitioner Zuern's rights under the Fifth Amendment, the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment were violated when the prosecution put forward evidence and argument characterizing Petitioner's post-arrest silence and failure to testify as proof of his guilt of a capital crime.

Claim 10. The fundamental fairness of Petitioner Zuern's trial, guaranteed by the Due Process Clause of the Fourteenth Amendment, was compromised when jurors were exposed to the sight of Petitioner in the shackles he wore as he entered [and] left the courtroom.

Claim 11. An instruction which prohibits jurors from deliberating on a lesser included offense unless and until they have decided to acquit on the greater, capital, offense is unduly coercive and offends the Eighth and Fourteenth Amendments.

Claim 12. The prosecution's voir dire so indoctrinated jurors to return a death verdict that Petitioner Zuern was denied a fair and

impartial sentencing proceeding in violation of the Eighth Amendment and the Due Process Clause of the Fourteenth Amendment.

Claim 13. Petitioner Zuern was deprived of his rights to a fair trial and a fair and impartial jury in a capital case, guaranteed by the Sixth, Eighth and Fourteenth Amendments, when the prosecution systematically used its peremptory challenges to purge all prospective jurors who expressed hesitancy about imposing the death sentence.

Claim 14. The death sentence in Petitioner Zuern's case stands in violation of the Eighth and Fourteenth Amendments. It was imposed after a sentencing proceeding in which the trial judge allowed Petitioner to withhold all mitigating evidence.

Claim 15. The death sentence in Petitioner Zuern's case violates the Sixth Amendment, the Eighth Amendment and the Due Process Clause of the Fourteenth Amendment. The trial judge who imposed that sentence relied on improper information he obtained and considered ex parte, without Petitioner's knowledge or consent.

Claim 18. Petitioner Zuern was denied the effective assistance of counsel at his capital trial. His conviction and death sentence violate the Sixth and Fourteenth Amendments.

Claim 19. Petitioner Zuern was deprived of the effective assistance of counsel on his direct appeals as of right in violation of the Due Process Clause of the Fourteenth Amendment.

Claim 25. Petitioner Zuern was charged with an invalid capital specification, thus the weighing process conducted by the jury was skewed and the death sentence violates the Eighth and Fourteenth Amendments to the United States Constitution.

Petitioner's Motion for Certificate of Appealability, Doc. #360, p. 46.

28 U.S.C. §2253 as amended by the Antiterrorism and Effective Death Penalty Act of 1996 (Pub. L. No 104-132, 110 Stat. 1214)(the "AEDPA"), provides in pertinent part:

(c)

(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals

from--

(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or

(B) the final order in a proceeding under section 2255.

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

A person in custody upon a state conviction seeking to appeal an adverse ruling on a petition for writ of habeas corpus in the district court must obtain a certificate of appealability before proceeding. 28 U.S.C. §2253; Fed. R. App. P. 22. To obtain a certificate of appealability, a petitioner must show at least that “jurists of reason would find it debatable whether the petition states a valid claim of denial of a constitutional right.” *Slack v. McDaniel*, 120 S. Ct. 1595, 1604 (2000) If the district court dismisses the petition on procedural grounds without reaching the constitutional questions, the petitioner must also show that jurists of reason would find it debatable whether the district court was correct in its procedural ruling. *Slack*, 120 S. Ct. at 1604. The procedural issue should be decided first so as to avoid unnecessary constitutional rulings. *Slack*, 120 S. Ct. at 1604, citing *Ashwander v. TVA*, 297 U.S. 288, 347, 56 S. Ct. 466, 80 L. Ed. 688 (1936)(Brandeis, J., concurring). The first part of this test is equivalent to making a substantial showing of the denial of a constitutional right, including showing that reasonable jurists could debate whether the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further, *Slack v. McDaniel*, 120 S. Ct. 1595, 1604 (2000), quoting *Barefoot v. Estelle*, 463 U.S. 880, 893, 103 S. Ct. 3383, 77 L. Ed. 2d 1090 (1983).

The standard is higher than the absence of frivolity required to permit an appeal to

proceed *in forma pauperis*. *Id.* at 893.

Obviously the petitioner need not show that he should prevail on the merits... Rather, he must demonstrate that the issues are debatable among jurists of reason; that a court could resolve the issues [in a different manner]; or that the questions are 'adequate to deserve encouragement to proceed further.'

Id. n.4.

District courts have the power to issue certificates of appealability under the AEDPA in §2254 cases.

Lyons v. Ohio Adult Parole Authority, 105 F. 3d 1063 (6th Cir. 1997); *Hunter v. United States*, 101 F. 3d 1565 (11th Cir. 1996)(en banc). *Slack v. McDaniel* does not speak to this point.

This Report will analyze the claims on which Petitioner seeks a certificate of appealability in the order in which Petitioner presents them.

Claim 6: Denial of Mistrial

In Claim 6 Petitioner asserts that he should have been granted a mistrial when State's witness Wayne Clyde Lewis testified that he had told a guard "He's [Zuern's] crazy, man. He's in here for murder and he won't hesitate to do it again." The Magistrate Judge recommended that relief be granted on this claim, but Chief Judge Rice sustained Respondent's objection to that recommendation. 101 F. Supp. at 1012. In doing so, he did not point to some obvious error in the Magistrate Judge's reasoning, but rather reweighed the elements to be considered in granting a mistrial and arrived at a different balance. The Magistrate Judge believes Chief Judge Rice's process of arriving at a conclusion on this claim shows that the Magistrate Judge's contrary conclusion was not objectively unreasonable. Because objectively reasonable jurists disagree on the correct outcome, Petitioner should be granted a certificate of appealability on Claim 6.

Claims 1 and 2: Insufficient Evidence to Convict

On both of these claims, Petitioner cites repeated references in Chief Judge Rice's opinion that the evidence of guilt was not overwhelming, particularly on the element of prior calculation and design. Reasonable jurists might, therefore, conclude that insufficient evidence had been presented to permit a jury to find guilt beyond a reasonable doubt, even though neither the Magistrate Judge nor the Chief Judge did so. Petitioner should be granted a certificate of appealability on his first and second claims.

Claim 7: Failure to Excuse Juror Beulah Taylor

The question of whether Juror Beulah Taylor should have been excused after she was exposed to a news report of Petitioner's reason for incarceration — a prior homicide — and requested to be excused is sufficiently close to merit further consideration by the Court of Appeals. Petitioner should be granted a certificate of appealability on this claim.

Claim 15: Improper Consideration of Presentence Investigation Report

Petitioner claims that he was improperly sentenced on the basis of a presentence investigation report prepared without his knowledge or consent and considered by the trial judge in sentencing. The Magistrate Judge credited trial judge Morrissey's statement at the time of the post-conviction relief petition that he did not consider the PSI in imposing sentence; his opinion in

sentencing makes no reference to the document. Chief Judge Rice concluded further that, even assuming it was deficient performance to fail to raise this claim on appeal, there was no prejudice because neither the Court of Appeals nor the Ohio Supreme Court could possibly have considered the document in their appropriateness review since it was not part of the record on appeal. Petitioner has not made a substantial showing that his constitutional rights were violated by consideration of this report and should not be granted a certificate of appealability on this claim.

Claim 18: Ineffective Assistance of Trial Counsel

Petitioner asserts his conviction should be vacated because he received ineffective assistance from his trial attorney. The Magistrate Judge recommended that this claim be denied on the merits and Chief Judge Rice agreed. Rather than re-arguing the various claims previously made as to ineffective assistance, Petitioner cites in his Motion only an “example” — failure to trial counsel to make an opening statement. For reasons already stated in the Report and Recommendations and adopted by the Chief Judge, this and the other claims of ineffective assistance of trial counsel are without merit either because they do not represent deficient performance by trial counsel or were not prejudicial or both. Petitioner should be denied a certificate of appealability on this claim.

Claim 19: Ineffective Assistance of Appellate Counsel

Both the Magistrate Judge and Chief Judge Rice dealt with this claim summarily

(Report and Recommendations, Doc. #329, p. 71), 101 F. Supp. 2d at 1002, indicating their opinion that this was not a close question.

In arguing for a certificate of appealability, Petitioner quotes the evidentiary hearing testimony of expert witness Harry Reinhart to the effect that every possible issue of federal constitutional error supported on the basis of a complete record must be raised on appeal and that this has been the standard of practice in capital litigation in Ohio since 1981. Without questioning Mr. Reinhart's skill or opinion as a capital defense litigator², the Court cannot accept his opinion as determinative. The Supreme Court has repeatedly held that an attorney need not advance every argument, regardless of merit, urged by the appellant. *Jones v. Barnes*, 463 U.S. 745, 103 S. Ct. 3308, 77 L. Ed. 2d 987 (1983) ("Experienced advocates since time beyond memory have emphasized the importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues." 463 U.S. 751-52). Effective appellate advocacy is rarely characterized by presenting every non-frivolous argument which can be made. *See Smith v. Murray*, 477 U.S. 527, 106 S. Ct. 2661, 91 L. Ed. 2d 434 (1986). The validity of these observations as applied to this case is evident from the fact that no prejudice was found in the failure to present the arguments which were procedurally defaulted.

Petitioner should not be granted a certificate of appealability on his nineteenth claim.

Claim 4: Duty to Correct "Perjury" of Wayne Clyde Lewis

²Mr. Rinehart is presently representing another capital habeas corpus petitioner in this Court upon appointment by the Court made after the time he testified in this case.

In Claim 4, Petitioner asserts that Wayne Clyde Lewis lied to the jury about his prior criminal record and about the alleged fact that he had what Petitioner calls a “wink and a nod” agreement with the State for favorable treatment on pending charges in return for his testimony against Mr. Zuern. The Magistrate Judge recommended this claim be denied on the merits (Report and Recommendations, Doc. #329, p. 32) because Mr. Lewis’ criminal record was completely available to defense counsel for cross-examination and there was no proof of such an agreement. Chief Judge Rice affirmed. 101 F. Supp. 2d at 972. Nothing in the Motion for Certificate of Appealability persuades the Magistrate Judge that either of these is a close question or that further pursuit of them deserves encouragement.

Claim 3: *Brady v. Maryland*

In Claim 3 Petitioner asserted the prosecution suppressed evidence in violation of *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). The Magistrate Judge recommended this claim be denied in its entirety, but Chief Judge Rice granted the claim insofar as it relates to the Schweinefus Memorandum and otherwise denied it. 101 F. Supp. 2d at 963-972. Petitioner seeks a certificate of appealability as to the balance of the claim, to wit, the failure of the State to disclose an agreement with Wayne Clyde Lewis for his testimony.

As the Magistrate Judge recommended and Chief Judge Rice found, there is no probative evidence of such an agreement. All of the evidence to which Petitioner points is circumstantial evidence consistent with a deal, but inconsistent with direct testimony that no agreement was made. The Magistrate Judge is unaware of any case authority for the proposition that

an agreement can be inferred under those circumstances and then the failure to disclose the agreement made the basis of habeas corpus relief under *Brady*. Petitioner should therefore be denied a certificate of appealability on the remaining portion of Claim 3.

Claims On Which the Respondent Argued Procedurally Default

The Magistrate Judge recommended that Claims 5, 8, 10, 11, 12, 13, 14, and 25 be found to be procedurally defaulted in the state courts. As to each such claim, Petitioner asserted that any procedural default was overcome by his showing of cause and prejudice. Chief Judge Rice overruled Petitioner's objections on the recommendations on each of these claims by finding Petitioner's purported showing of cause and prejudice to be insufficient.

A substantial portion of the procedural default analysis was based on the conclusion that the Ohio courts had applied to Mr. Zuern the Ohio criminal *res judicata* rule, to wit, that a claim which could have been raised on direct appeal but was not is barred from consideration in a post-conviction petition proceeding under Ohio Revised Code § 2953.21. *Ohio v. Perry*, 10 Ohio St. 2d 175, 226 N.E. 2d 104 (1967); *Ohio v. Cole*, 2 Ohio St. 3d 112, 443 N.E. 2d 169 (1982). An exception to that rule exists in Ohio when the same attorney represents a person at trial and on direct appeal, because such an attorney cannot reasonably be expected to raise his own ineffective assistance at trial. *Ohio v. Lentz*, 70 Ohio St. 3d 527, 639 N.E. 2d 784 (1994). In this case, the Court of Appeals found an exception to the exception: *res judicata* still applies if the trial attorney continues on appeal but is joined by additional counsel. *Ohio v. Zuern*, 1991 WL 256497 (Ohio Ct. App. 1st Dist. Dec. 4, 1991)(unpublished opinion).

As Petitioner correctly notes, a claim in federal habeas may be procedurally defaulted only if the state courts act pursuant to an adequate and independent state rule which is firmly established and regularly followed by the time as of which it was applied in the case in suit. *Combs v. Coyle*, 205 F. 3d 269 (6th Cir. 2000). In the *Combs* case, the Sixth Circuit was asked to recognize the rule applied by the Court of Appeals in this case and opined “Even today, it is not clear that the *Zuern* rule would qualify as a firmly established state procedural rule.” *Id.* at 277, n.4.

However, *Combs* was decided between the time the Report and Recommendations were filed and the final decision by Chief Judge Rice. Citing *Combs*, he indicated the Court would not find procedural default as to any claims of ineffective assistance of trial counsel. 101 F. Supp. 2d at 957, n. 6. However, *Combs* does not call into question the validity of Ohio’s criminal *res judicata* doctrine in other respects and Chief Judge Rice rejected Petitioner’s broad attack on the applicability of that doctrine in this case. 101 F. Supp. 2d at 957-961. He went on to find with respect to each of these claims on which Respondent argued procedural default that Petitioner was not able to show cause and prejudice such as would be necessary to excuse any procedural default.

An appeal would have to overcome both of these barriers, to wit, the finding of procedural default and the finding of no cause and prejudice. As is emphasized in Respondent’s Memorandum in Opposition to the Motion for Certificate of Appealability, with respect to each of these claims, Chief Judge Rice’s finding of no cause and prejudice is grounded in solidly established circuit court law on the merits of the underlying claims. Therefore, no certificate of appealability should be issued on Claims 5, 8, 10, 11, 12, 13, 14, and 25.

Conclusion

In accordance with the foregoing analysis, it is respectfully recommended that a certificate of appealability issue to Petitioner on Claims 1, 2, 6, and 7 and otherwise be denied.

October 11, 2000.

Michael R. Merz
United States Magistrate Judge

NOTICE

Pursuant to Fed. R. Civ. P. 72(b), any party may serve and file specific, written objections to the proposed findings and recommendations within ten days after being served with this Report and Recommendations. Pursuant to Fed. R. Civ. P. 6(e), this period is automatically extended to thirteen days (excluding intervening Saturdays, Sundays, and legal holidays) because this Report is being served by mail and may be extended further by the Court on timely motion for an extension. Such objections shall specify the portions of the Report objected to and shall be accompanied by a memorandum of law in support of the objections. If the Report and Recommendations are based in whole or in part upon matters occurring of record at an oral hearing, the objecting party shall promptly arrange for the transcription of the record, or such portions of it as all parties may agree upon or the Magistrate Judge deems sufficient, unless the assigned District Judge otherwise directs. A party may respond to another party's objections within ten days after being served with a copy thereof.

Failure to make objections in accordance with this procedure may forfeit rights on appeal. *See, United States v. Walters*, 638 F.2d 947 (6th Cir. 1981); *Thomas v. Arn*, 474 U.S. 140, 106 S. Ct. 466, 88 L. Ed. 2d 435 (1985).